

and hold shares of, the Money Market Funds only to the extent that the Registered Investing Fund's aggregate investment of Uninvested Cash in the Money Market Funds does not exceed 25 percent of the Registered Investing Fund's total assets. For purposes of this limitation, each Registered Investing Fund and series thereof will be treated as a separate investment company.

4. Investment by a Registered Investing Fund in shares of the Money Market Funds will be in accordance with each Registered Investing Fund's respective investment restrictions and will be consistent with each Registered Investing Fund's policies as set forth in its prospectus and statement of additional information.

5. Each Registered Investing Fund and each Money Market Fund relying on the order will be advised by an Adviser. A Registered Investing Fund that is subadvised, but not advised, by an Adviser may rely on the order provided that the Adviser manages the Uninvested Cash and the Registered Investing Fund is in the same group of investment companies (as defined in 12(d)(1)(G) of the Act) as the Money Market Fund in which the Registered Investing Fund invests its Uninvested Cash. Each Non-Registered Investing Fund will be advised by an Adviser or have an Adviser as its general partner exercising investment discretion.

6. So long as its shares are held by an Investing Fund no Money Market Fund shall acquire securities of any other investment company in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

**J. Lynn Taylor,**

*Assistant Secretary.*

[FR Doc. 03-28595 Filed 11-14-03; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 34-48765; File No. PCAOB-2003-06]

### Public Company Accounting Oversight Board; Notice of Filing and Order Granting Accelerated Approval of Proposed Temporary Hearing Rules Relating to Disapproved Registration Applications

November 10, 2003.

Pursuant to section 107(b) of the Sarbanes-Oxley Act of 2002 (the "Act"), notice is hereby given that on October 1, 2003, the Public Company

Accounting Oversight Board (the "Board" or the "PCAOB") filed with the Securities and Exchange Commission (the "SEC" or "Commission") the proposed rules described in Items I and II below, which items have been prepared by the Board.

#### I. Board's Statement of the Terms of Substance of the Proposed Rules

On September 29, 2003, the Board adopted rules on investigations and adjudications (the "Enforcement Rules"). The current proposal is limited to a subset of the Enforcement Rules. The subset consists of certain rules that would govern hearings that the Board may hold concerning possible disapproval of applications for registration. As to the subset (the "Temporary Hearing Rules"), the Board requests that the Commission grant accelerated effectiveness, pursuant to section 19(b)(2) of the Securities Exchange Act of 1934 ("Exchange Act"). The Board seeks accelerated effectiveness of the Temporary Hearing Rules to facilitate any registration disapproval hearings that may be necessary before the Enforcement Rules are approved. The Board requests that effectiveness only on a temporary basis. The Temporary Hearing Rules would be superseded by any Enforcement Rules approved by the Commission, upon final Commission approval of those rules. The Temporary Hearing Rules include 41 rules and nine definitions, all of which are designated as temporary by appending a "T" to the rule number. The text of the Temporary Hearing Rules is set forth below.

#### Rules of the Board

##### Section 1. General Provisions

##### Rule 1001. Definitions of Terms Employed in Rules

When used in the Rules, unless the context otherwise requires—

(a)(ix) *T Accounting Board Demand.* The term "accounting board demand" means a command to produce documents and/or to appear at a certain time and place to give testimony.

(a)(x) *T Accounting Board Request.* The term "accounting board request" means a request to produce documents and/or to appear at a certain time and place to give testimony.

(c)(ii) *T Counsel.* The term "counsel" means an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

(h)(i) *T Hearing Officer.* The term "hearing officer" means a person, other than a Board member or staff of the

interested division, duly authorized by the Board to preside at a hearing.

(i)(iv) *T Interested Division.* The term "interested division" means a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding.

(o)(ii) *T Order Instituting Proceedings.* The term "order instituting proceedings" means an order issued by the Board commencing a disciplinary proceeding.

(p)(iii) *T Party.* The term "party" means the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

(p)(iv) *T Person.* The term "person" means any natural person or any business, legal or governmental entity or association.

(s)(iii) *T Secretary.* The term "Secretary" means the Secretary of the Board.

#### Rule 1002T. Time Computation

In computing any period of time prescribed in or allowed by these Rules or by order of the Board, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included unless it is a Saturday, Sunday, or federal legal holiday, in which event the period runs until the end of the next day that is not a Saturday, Sunday, or federal legal holiday. Intermediate Saturdays, Sundays, and federal legal holidays shall be excluded from the computation when the period of time prescribed or allowed is seven days or less, not including any additional time allowed by rule or order for service by mail. If on the day a filing is to be made, weather or other conditions have caused the Secretary's office or other designated filing location to close, the filing deadline shall be extended to the end of the next day that is neither a Saturday, a Sunday, nor a federal legal holiday.

**Note:** The Secretary will maintain a list of federal legal holidays.

### Section 5. Investigations and Adjudications

Rule 5000. [Reserved]

Part 1—[Reserved]

Part 2—Disciplinary Proceedings

Rule 5200T. Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) Appointment of a Hearing Officer

As soon as practicable after the Board has issued an order instituting proceedings, or after a registration applicant has requested a hearing pursuant to Rule 5500(b), the Secretary shall assign a hearing officer to preside over the proceeding and shall serve the parties with notice of the hearing officer's assignment. Subject to Rules 5402 and 5403, the hearing officer shall have the authority to do all things necessary and appropriate to discharge his or her duties. The powers of the hearing officer include, but are not limited to, the following—

(1) Obtaining a court reporter to administer oaths and affirmations;

(2) Issuing accounting board demands pursuant to Rule 5424;

(3) Receiving relevant evidence and ruling upon the admission of evidence and offers of proof;

(4) Regulating the course of a proceeding and the conduct of the parties and their counsel;

(5) Holding prehearing and other conferences and requiring the attendance at any such conference of at least one representative of each party who has authority to negotiate concerning the resolution of issues in controversy;

(6) Recusing himself or herself upon motion made by a party or upon his or her own motion;

(7) Ordering, in his or her discretion, in a proceeding involving more than one respondent, that the interested division indicate, on the record, at least one day prior to the presentation of any evidence, each respondent against whom that evidence will be offered;

(8) Subject to any limitations set forth elsewhere in these Rules, considering and ruling upon all procedural and other motions;

(9) Preparing an initial decision as provided in Rule 5204;

(10) Upon notice to all parties, reopening any hearing prior to the filing of an initial decision therein, or, if no initial decision is to be filed, prior to the time fixed for the filing of final briefs with the Board;

(11) Informing the parties as to the availability of one or more alternative means of dispute resolution, and

encouraging the use of such methods; and

(12) Scheduling hearing dates, except that a hearing officer may not, absent the approval of the Board, change a hearing date set by Board order.

(c) Separation of Functions

The staff of the Division of Enforcement and Investigations may not participate or advise in the decision, or in Board review of the decision, in any proceeding in which the Division of Enforcement and Investigations is the interested division, except as a witness or counsel in the proceeding. Any other employee or agent of the Board engaged in the performance of investigative or prosecutorial functions for the Board in a proceeding may not, in that proceeding or one that is factually related, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. A hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

(d) Consolidation of Proceedings

By order of the Board or a hearing officer, proceedings involving a common question of law or fact may be consolidated for hearing of any or all the matters at issue in such proceedings. The Board or the hearing officer may make such orders concerning the conduct of such proceedings as it deems appropriate to avoid unnecessary cost or delay. Consolidation shall not prejudice any rights under these Rules and shall not affect the right of any party to raise issues that could have been raised if consolidation had not occurred. For purposes of this Rule, no distinction is made between joinder and consolidation of proceedings.

Rule 5201T. Notification of Commencement of Disciplinary Proceedings

(a) [Reserved]

(b) [Reserved]

(c) Notice of a Hearing on a Registration Application

In the case of a proceeding pursuant to Rule 5500, the notice of a hearing shall state proposed grounds for disapproving the registration application.

(d) [Reserved]

Rule 5202T. Record of Disciplinary Proceedings

(a) Contents of the Record

(1) Record of a Disciplinary Proceeding

A hearing record shall consist of—

(i) The order instituting proceedings, each notice of hearing and any amendments;

(ii) Each application, supplemental application, motion, submission or other paper, and any amendments, motions, objections, and exceptions to or regarding them;

(iii) Each stipulation, transcript of testimony and document or other information admitted into evidence;

(iv) Each written communication accepted by the hearing officer pursuant to Rule 5420;

(v) With respect to a request to disqualify a hearing officer or to allow the hearing officer's withdrawal pursuant to Rule 5402, each affidavit or transcript of testimony taken and the decision made in connection with the request;

(vi) All motions, briefs and other papers filed on interlocutory appeal;

(vii) Any proposed findings and conclusions;

(viii) Each written order or notice issued by the hearing officer or the Board; and

(ix) Any other document or item accepted into the record by the Board or the hearing officer.

(2) Record on Disapproval of Application for Registration

The record on a disapproval of an application with respect to which the applicant has elected to waive its opportunity for a hearing pursuant to Rule 5500 shall consist of—

(i) The application for registration, and any supplemented application;

(ii) Any additional information provided by the applicant;

(iii) Any other information obtained by the Board in connection with the application;

(iv) The notice of a hearing and any written order issued by the Board; and

(v) Any other document or item accepted into the record by the Board.

(b) Documents Not Admitted

Any document offered in evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered a part of the record. The Secretary shall retain any documents offered in evidence but excluded until all opportunities for Commission and judicial review have been exhausted or waived.

## (c) Substitution of Copies

A true copy of a document may be substituted for any document in the record or any document retained pursuant to paragraph (b) of this Rule.

## (d) Preparation of Record and Certification of Record Index

Promptly after the close of a hearing, the hearing officer shall transmit to the Secretary an index of any motions, exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer that have not been previously transmitted to the Secretary, and the Secretary shall prepare a record index. Prior to issuance of an initial decision, the Secretary shall transmit the record index to the hearing officer and serve a copy of the record index on each party. Any party may file proposed corrections to the record index with the hearing officer within 15 days of service of the record index. The hearing officer shall, by order, direct whether any corrections to the record index shall be made. The Secretary shall make such corrections, if any, and issue a revised record index. The initial decision shall include a certification that the record consists of the items set forth in the record index or revised record index issued by the Secretary.

## (e) Final Transmittal of Record Items to the Secretary

After the close of a hearing, the hearing officer shall transmit to the Secretary originals of exhibits or any other documents submitted to, or accepted into evidence by, the hearing officer, and any other portions of the record that have not already been transmitted to the Secretary. Prior to service of the initial decision by the Secretary, the Secretary shall inform the hearing officer if any portions of the record are not in the Secretary's custody.

## Rule 5203T. Public and Private Hearings

No hearing shall be public unless ordered by the Board. In any proceeding commenced pursuant to Rule 5200(a), the Board shall not order that a hearing be public except for good cause shown and with consent of the parties.

## Rule 5204T. Determinations in Disciplinary Proceedings

## (a) [Reserved]

## (b) Initial Decision of a Hearing Officer

Unless the Board directs otherwise, a hearing officer shall prepare an initial decision in any proceeding in which the Board directs a hearing officer to preside at a hearing. An initial decision shall include findings and conclusions,

including sanctions, if appropriate, and the reasons or basis therefor, as to all the material issues of fact, law or discretion presented on the record and such other information as the Board may require.

**Note:** Unless the Board has directed otherwise, the Board expects hearing officers in proceedings pursuant to Rule 5500 to prepare initial decisions within 45 days after the deadline for filing post-hearing briefs or other submissions.

## (c) Filing, Service and Publication

The hearing officer shall file the initial decision with the Secretary. The Secretary shall promptly serve the initial decision upon the parties. In a public proceeding, the Secretary shall as soon as practicable thereafter publish the initial decision, unless the Board otherwise directs.

## (d) When Final

(1) An initial decision as to a party shall become the final decision of the Board as to that party upon issuance of a notice of finality by the Secretary.

(2) Subject to subparagraph (3) of this paragraph, the Secretary shall issue a notice of finality no later than 20 days after the lapsing of the time period for filing a petition for review of the initial decision.

(3) The Secretary shall not issue a notice of finality as to any party

(i) Who has filed a timely petition for review; or

(ii) with respect to whom the Board has ordered review of the initial decision pursuant to Rule 5460(b).

## Rule 5205T. Settlement of Disciplinary Proceedings Without a Determination After Hearing

## (a) Availability

Any firm or person who is notified that a proceeding may or will be instituted against him or her, or any firm or person that is a party to a proceeding already instituted, may, at any time, propose in writing an offer of settlement.

## (b) Procedure

An offer of settlement shall state that it is made pursuant to this Rule; shall recite or incorporate as a part of the offer the provisions of paragraphs (c)(2) and (3) of this Rule; shall be signed by the person making the offer, not by counsel; and shall be submitted to the Director of Enforcement and Investigations.

## (c) Consideration of Offers of Settlement

(1) The Director of Enforcement and Investigations shall present an offer of settlement to the Board with his or her recommendation, except that, if the

recommendation is unfavorable, the offer shall not be presented to the Board unless the person making the offer so requests.

(2) By submitting an offer of settlement, the person making the offer waives, subject to acceptance of the offer—

(i) All hearings pursuant to the statutory provisions under which the proceeding is to be or has been instituted;

(ii) the filing of post-hearing briefs or other submissions, proposed findings of fact and conclusions of law;

(iii) proceedings before, and an initial decision by, a hearing officer;

(iv) all post-hearing procedures; and

(v) judicial review by any court.

(3) By submitting an offer of settlement the person further waives—

(i) such provisions of the Rules of Board Procedure or other requirements of law as may be construed to prevent any member of the Board's staff from participating in the preparation of, or

advising the Board as to, any order, opinion, finding of fact, or conclusion of law to be entered pursuant to the offer; and

(ii) any right to claim bias or prejudice by the Board based on the consideration of or discussions concerning settlement of all or any part of the proceeding.

(4) If the Board rejects the offer of settlement, the person making the offer shall be notified of the Board's action and the offer of settlement shall be deemed withdrawn. The rejected offer shall not constitute a part of the record in any proceeding against the person making the offer. Rejection of an offer of settlement does not affect the continued validity of waivers pursuant to paragraph (c)(3) of this Rule with respect to any discussions concerning the rejected offer of settlement.

(5) Final acceptance of any offer of settlement will occur only upon the issuance of findings and an order by the Board.

**Note:** In a hearing on disapproval of registration, an offer of settlement will be considered and handled by the Director of Registration and Inspections in accordance with Rule 5206 as if the Director of Registration and Inspections were the Director of Enforcement and Investigations.

## Rule 5206. [Reserved]

## Part 3—[Reserved]

## Part 4—Rules of Board Procedure

## General

## Rule 5400T. Hearings

Hearings for the purpose of taking evidence shall be held only upon order

of the Board. All hearings shall be conducted in a fair, impartial, expeditious and orderly manner.

**Rule 5401T. Appearance and Practice Before the Board**

A person shall not be represented before the Board or a hearing officer except as stated in paragraphs (a) or (b) of this Rule or as otherwise permitted by the Board or a hearing officer.

**(a) Representing Oneself**

In any proceeding, an individual may appear on his or her own behalf.

**(b) Representing Others**

In any proceeding, a person may be represented by counsel; a member of a partnership may represent the partnership; a bona fide officer of a corporation, trust or association may represent the corporation, trust or association.

**(c) Designation of Address for Service; Notice of Appearance; Power of Attorney; Withdrawal**

**(1) Representing Oneself**

When an individual first makes any filing or otherwise appears on his or her own behalf before the Board or a hearing officer, he or she shall file with the Secretary both an electronic and a mailing address at which any notice or other written communication required to be served upon him or her or furnished to him or her may be sent and a telephone number where he or she may be reached during business hours, and the individual shall promptly advise the Secretary of changes to that information during the course of the proceeding.

**(2) Representing Others**

When a person first makes any filing or otherwise appears in a representative capacity before the Board or a hearing officer, that person shall file with the Secretary, and keep current, a written notice stating the name of the proceeding; the representative's name, mailing address, electronic address and telephone number; and the name and electronic and mailing addresses of the person or persons represented; and, if the person is an attorney, a declaration that the attorney is admitted to practice before the Supreme Court of the United States or the highest court of any state, as defined in Section 3(a)(16) of the Exchange Act.

**(3) Power of Attorney**

Any individual appearing or practicing before the Board in a representative capacity may be required to file a power of attorney with the

Board showing his or her authority to act in such capacity.

**(4) Withdrawal**

Withdrawal by any individual appearing in a representative capacity shall be permitted only by order of the Board or the hearing officer. A motion seeking leave to withdraw shall state with specificity the reasons for such withdrawal. Leave to withdraw shall not be withheld absent good cause.

**Rule 5402T. Hearing Officer Disqualification and Withdrawal**

**(a) Motion for Withdrawal**

A party who has a reasonable, good faith basis to believe that a hearing officer has a conflict of interest or personal bias, or circumstances otherwise exist such that the hearing officer's fairness may reasonably be questioned, may make a motion to the hearing officer that the hearing officer withdraw, which shall be filed with the Secretary. The motion shall be accompanied by an affidavit setting forth in detail the facts alleged to constitute grounds for disqualification. If the hearing officer finds himself or herself not disqualified, he or she shall so rule and shall continue to preside over the proceeding. A motion for withdrawal shall be filed within 15 days after the later of—

(1) When the party learned of the facts believed to constitute the basis for the disqualification; or

(2) when the party was notified of the assignment of the hearing officer.

**(b) Appointment of a Replacement Hearing Officer**

Upon withdrawal of a hearing officer, or in the event that a hearing officer is incapacitated or is otherwise unable to continue to serve after being appointed, the Secretary will appoint a replacement hearing officer. To ensure fairness to the parties and expedite completion of the proceeding when a replacement hearing officer is appointed after a hearing has commenced, the replacement hearing officer may recall any witness or may certify familiarity with any part or all of the record.

**Rule 5403T. Ex Parte Communications**

Except to the extent permitted for the disposition of ex parte matters as authorized by law or the Board's Rules—

(a) The person presiding over an evidentiary hearing may not consult a person or party on a fact in issue, unless on notice and with opportunity for all parties to participate; and

(b) neither a party, nor any Board staff that substantially assists the interested

division on the particular matter, whether before or during the hearing, may—

(1) Communicate with the person presiding over an evidentiary hearing on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) communicate with the Board or any member of the Board on a fact in issue, unless on notice and opportunity for all parties to participate or under circumstances in which a party excluded from the communication has waived the rights described in Rule 5205(c)(3) with respect to the matters that are the subject of the communication.

**Rule 5404T. Service of Papers by Parties**

In every proceeding, each paper, including each notice of appearance, written motion, brief, or other written communication, shall be served upon each party in a manner calculated to bring the paper to the attention of the party to be served.

**Rule 5405T. Filing of Papers With the Board: Procedure**

**(a) When To File**

All papers required to be served by a party upon any person shall be filed with the Board at the time of service or promptly thereafter. Papers required to be filed with the Board must be received within the time limit, if any, for such filing.

**(b) Where To File**

Unless otherwise permitted by the Secretary, filing of papers with the Board shall be made by electronically filing them with the Secretary.

**Note:** When a document has been filed electronically, the official record is the electronic recording of the document as stored by the Secretary, and the filing party is bound by the document as filed. A document filed electronically is deemed filed at the date received electronically by the Secretary. Upon request, the Secretary may permit regulators granted permission to participate on a limited basis (to request a stay), amici curiae, nonparties and others to file in paper form. Where practicable, the Secretary will scan such a filing into the docket file.

**Rule 5406T. Filing of Papers: Form**

**(a) Specifications**

Papers filed in connection with any proceeding shall—

(1) Be formatted in a Portable Document Format on pages measuring 8½ x 11 inches, except that, upon consent of the Secretary for good cause, a document may be filed in paper form;

**Note:** To the extent that the reduction of larger documents would render them illegible, the Secretary may consent to the filing of such documents on larger paper, in electronic or paper form.

(2) include at the head of the paper, or on a title page, the name of the Board, the title of the proceeding, the names of the parties, the subject of the particular paper or pleading, and the file number assigned to the proceeding;

(3) be paginated with margins at least 1 inch wide; and

(4) be double-spaced in a 12-point font, with single-spaced footnotes and single-spaced indented quotations.

#### (b) Form of Briefs

All briefs containing more than 10 pages shall include a table of contents, an alphabetized table of cases, a table of statutes, and a table of other authorities cited, with references to the pages of the brief wherein they are cited.

#### Rule 5407T. Filing of Papers: Signature Requirement and Effect

Following the issuance of an order instituting proceedings, every filing of a party who represents himself or herself shall sign his or her individual name and state the date and his or her address and telephone number on every filing. A party represented by counsel shall be signed by at least one counsel of record in his or her name and shall state that counsel's business address and telephone number.

**Note:** If practicable, a party's or an attorney's signature should be scanned into an electronic document. In any event, however, the use of an attorney's electronic mail address, or password for the Board's electronic filing system, shall constitute the signature of that attorney.

#### Rule 5408T. Motions

##### (a) Generally

Unless made during a hearing or conference, a motion shall be in writing, shall state with particularity the grounds therefor, shall set forth the relief or order sought, and shall be accompanied by a written brief of the points and authorities relied upon. Unless otherwise ordered by the Board or the hearing officer, if a motion is properly made to the Board concerning a proceeding to which a hearing officer is assigned, the proceeding before the hearing officer shall continue pending the determination of the motion by the Board. No oral argument shall be heard on any motion unless the Board or the hearing officer otherwise directs.

##### (b) Opposing and Reply Briefs

Except as provided in Rule 5427, and unless otherwise ordered by the Board

or a hearing officer, a brief in opposition to a motion shall be filed within five days after service of the motion. Reply briefs are only permitted with leave of the hearing officer.

##### (c) Length Limitation

Except as provided in Rule 5427, a brief in support of or opposition to a motion shall not exceed 10 pages, exclusive of pages containing any table of contents, table of authorities, and/or addendum. The hearing officer may grant requests for leave to file briefs in excess of 10 pages, upon a showing of good cause.

#### Rule 5409T. Default and Motions To Set Aside Default

##### (a) Default

A party to a proceeding may be deemed to be in default and the Board or the hearing officer may determine the proceeding against that party upon consideration of the record, including the order instituting proceedings or notice of a hearing, the allegations of which may be deemed to be true, if that party fails—

(1) To appear, in person or through a representative, at a hearing or conference of which that party has been notified;

(2) to answer when required to do so by a Board order, to respond to a dispositive motion within the time provided, or otherwise to defend the proceeding; or

(3) to cure a deficient filing within the time specified by the Board or the hearing officer.

##### (b) Motion To Set Aside Default

A motion to set aside a default shall be made within a reasonable time, state the reasons for the failure to appear or defend, and specify the nature of the proposed defense in the proceeding. In order to prevent injustice and on such conditions as may be appropriate, the hearing officer, at any time prior to the filing of the initial decision, or the Board at any time, may for good cause shown set aside a default.

#### Rule 5410T. Additional Time for Service by Mail

If service is made by mail, three days shall be added to the prescribed period for response.

#### Rule 5411T. Modifications of Time, Postponements and Adjournments

Except as otherwise provided by law, the Board, at any time, or the hearing officer, at any time prior to the filing of his or her initial decision, may, for good cause shown, extend or shorten any time limits prescribed by these Rules for

the filing of any papers and may, consistent with paragraph (b) of this Rule, postpone or adjourn any hearing.

#### Rules 5412.–5419. [Reserved]

#### Prehearing Rules

#### Rule 5420T. Stay Requests

##### (a) Leave To Participate To Request a Stay

The Board or the hearing officer may grant leave to participate on a limited basis only to an authorized representative of the Commission, an authorized representative of the United States Department of Justice, an authorized representative of a United States Attorney, an appropriate state regulatory authority, or an authorized representative of any criminal prosecutorial authority of any State or any other political subdivision of a State for the purpose of requesting a stay during the pendency of a Commission investigation or proceeding, a criminal investigation or prosecution, or a state regulatory proceeding, arising out of the same or similar facts that are at issue in the pending Board or disciplinary proceeding. Motions for leave to participate shall be in writing, shall set forth the nature and extent of the movant's interest in the proceeding, and, except where good cause for late filing is shown, shall be filed not later than 20 days prior to the date fixed for the commencement of the hearing. A stay granted pursuant to this Rule may be granted for such a period and upon such conditions as the Board or the hearing officer deems appropriate.

##### (b) Stay To Protect Ongoing Commission Investigation

Upon a showing that a stay requested pursuant to this Rule is necessary to protect an ongoing Commission investigation, the motion for the stay shall be granted.

##### (c) Other Stays

Upon a showing that such a stay is in the public interest or for the protection of investors, the motion for the stay shall be favored.

#### Rule 5421T. Answer to Allegations

##### (a) When Required

In its order instituting proceedings, the Board may require any party to file an answer to each of the allegations contained therein. Even if not so ordered, any party in any proceeding may elect to file an answer.

##### (b) When To File

Unless additional time is granted by the hearing officer or the Board, a party filing an answer as provided in

paragraph (a) of this Rule shall do so within 20 days after service upon the party of an order instituting proceedings pursuant to Rule 5500. If the order instituting proceedings is amended, the Board or the hearing officer may require that an amended answer be filed and, if such an answer is required, shall specify a date for the filing thereof.

**(c) Contents of Answer and Effect of Failure To Deny**

Unless otherwise directed by the hearing officer or the Board, an answer shall specifically admit, deny, or state that the party does not have, and is unable to obtain, sufficient information to admit or deny each allegation in the order instituting proceedings. When a party intends in good faith to deny only a part of an allegation, the party shall specify so much of it as is true and shall deny only the remainder. A statement of a lack of information shall have the effect of a denial. A defense of res judicata, statute of limitations or any other matter constituting an affirmative defense shall be asserted in the answer. Any allegation not denied shall be deemed admitted.

**Rule 5422T. Availability of Documents for Inspection and Copying**

**(a) Documents To Be Available for Inspection and Copying**

(1) [Reserved]

(2) [Reserved]

**(3) Proceedings Commenced Pursuant to Rule 5500**

Unless otherwise provided by this Rule, or by order of the Board or the hearing officer, in proceedings pursuant to Rule 5500, the Division of Registration and Inspections shall make available for inspection and copying by the applicant documents obtained by that division in connection with the registration application prior to the notice of hearing, except that the Division need not produce any documents described in subparagraph (b) that it does not intend to introduce as evidence.

**(b) Documents That May Be Withheld**

(1) The interested division may decline to make available for inspection and copying—

(i) Any document prepared by a member of the Board or of the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration;

(ii) any other document that is privileged, including any other document protected by the attorney work product doctrine;

(iii) any document that would disclose the identity of a confidential source; and

(iv) any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown.

(2) Nothing in this paragraph (b), or in paragraph (a)(2) above, authorizes the interested division in connection with a disciplinary proceeding or hearing on disapproval of registration to withhold documents that contain material exculpatory evidence.

**(c) Procedures Concerning Withheld Documents**

(1) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the respondent with a log of documents withheld pursuant to paragraph (b)(1)(ii) of this Rule. The log shall provide the same information that a person would be required to supply to the Board under Rule 5106 in connection with a privilege assertion. On a motion by any respondent, a hearing officer may, in his or her discretion, require the interested division to submit any document listed on the log for inspection by the hearing officer in camera. A hearing officer may order that any such document be made available to a respondent for inspection and copying only if the hearing officer determines that the document is not a document described in paragraph (b)(1)(ii).

(2) The interested division shall, at the time it makes documents available to a respondent under this rule, provide the hearing officer and each respondent with a list of documents withheld pursuant to paragraph (b)(1)(iii) or (b)(1)(iv) of this Rule and a brief description of the reason for withholding each document. The list provided to the respondent may be redacted as necessary to protect interests related to the interested division's reason for withholding the document. The hearing officer may require the interested division to submit any such document for inspection by the hearing officer in camera. The hearing officer may order that any such document be made available to the respondent for inspection and copying only if the hearing officer determines that—

(i) With respect to any document withheld pursuant to paragraph (b)(1)(iii)—

(A) producing the document would not have the effect of identifying a confidential source; or

(B) the document contains material, exculpatory evidence, provided, however, that to the extent such evidence can be disclosed without disclosing the identity of a confidential source, such identity shall not be disclosed.

(ii) with respect to any document withheld pursuant to paragraph (b)(1)(iv)—

(A) the document is relevant to the subject matter of the proceeding and no good cause exists for withholding it; or

(B) the document contains material, exculpatory evidence.

**(d) Timing of Inspection and Copying**

Unless otherwise ordered by the Board or the hearing officer, the interested division shall make documents available for inspection and copying to any respondent who is not in default under Rule 5409 no later than 14 days after the institution of proceedings pursuant to Rule 5500.

**(e) Place of Inspection and Copying**

Documents subject to inspection and copying pursuant to this Rule shall be made available to a party for inspection and copying at the Board office where they are ordinarily maintained, or at such other place as the parties, in writing, may agree. A party shall not be given custody of the documents or leave to remove the documents from the Board's offices pursuant to the requirements of this Rule other than by written agreement of the interested division. Such agreement shall specify the documents subject to the agreement, the date they shall be returned and such other terms or conditions as are appropriate to provide for the safekeeping of the documents.

**(f) Copying Costs and Procedures**

A party may obtain a photocopy of any documents made available for inspection. The party shall be responsible for the cost of photocopying. The respondent shall be given access to the documents at the Board's offices or such other place as the parties may agree during normal business hours for copying of documents at the respondent's expense.

**(g) Failure To Make Documents Available—Harmless Error**

In the event that a document required to be made available to a party pursuant to this Rule is not made available by the

interested division, no rehearing or rededication of a proceeding already heard or decided shall be required, unless the party shall establish that the failure to make the document available was not harmless error.

**Note:** The interested division's obligation under this Rule relates to documents obtained by that division. Documents located only in the files of other divisions or offices are beyond the scope of the Rule, except that documents located in the files of other divisions and that the interested division intends to introduce as evidence shall, for purposes of this Rule, be treated as if they have been obtained by the interested division and must therefore be made available under this Rule.

#### Rule 5423T. Production of Witness Statements

##### (a) Availability

Upon motion by any respondent in a disciplinary proceeding, the hearing officer may order that the interested division produce for inspection and copying any statement of any person called or to be called as a witness by the division that pertains, or is expected to pertain, to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the Board were a governmental entity. Such production shall be made at a time and place fixed by the hearing officer and shall be made available to any party, provided, however, that the production shall be made under conditions intended to preserve the items to be inspected or copied.

##### (b) Failure To Produce—Harmless Error

In the event that a statement required to be made available for inspection and copying by a respondent is not turned over by the interested division, no rehearing or rededication of a proceeding already heard or decided shall be required unless the respondent establishes that the failure to turn over the statement was not harmless error.

##### (c) Definition of Statement

For purposes of this Rule, the term "statement" shall have the meaning set forth in 18 U.S.C. 3500(e).

#### Rule 5424T. Accounting Board Demands and Commission Subpoenas

##### (a) Accounting Board Demands and Requests

In connection with any hearing ordered by the Board, a party may request the issuance of an accounting board demand of a registered public accounting firm or an associated person of such a firm, or an accounting board request of any other person. Such a

demand or request may call for the attendance and testimony of a witness at the designated time and place of the hearing or for the production of documentary or other tangible evidence returnable at any designated time or place. Unless made on the record at a hearing, an application for issuance of such a demand or request shall be made in writing and served on each party. A party whose application for such a demand or request has been denied or modified may not submit any other application seeking substantially the same testimony or other evidence specified in the denied application or excluded from an otherwise granted application.

##### (1) Unavailability of Hearing Officer

In the event that the hearing officer assigned to a proceeding is unavailable, any member of the Board, or other person designated by the Board for this purpose, may grant an application for the issuance of an accounting board demand or request. A party seeking such issuance may submit the application to the Secretary, who shall direct it to a person authorized to grant the request, deny the request, or grant the request with modifications.

##### (2) Signing May Be Delegated

A hearing officer may authorize issuance of an accounting board demand, or an accounting board request, and may delegate the manual signing of the demand or request to any other person.

##### (3) Standards for Issuance

Where it appears that an application for an accounting board demand or request is reasonable in scope and is reasonably calculated to encompass, or lead to the discovery of, admissible evidence, the application shall be granted. If it appears that the accounting board demand or request sought may be unreasonable, oppressive, excessive in scope, unduly burdensome, designed to seek irrelevant information, or sought for the purpose of harassment or delay, the application shall be denied. The hearing officer or other person ruling on the application may, in his or her discretion, as a condition precedent to the issuance of the demand or request, require the party seeking the demand or request to show the general relevance and reasonable scope of the testimony or other evidence sought. After consideration of all the circumstances, the hearing officer or other person ruling on the application may grant the application upon such conditions or with such modifications as fairness requires. In making the determination,

the hearing officer or other person ruling on the application may inquire of the parties whether they will stipulate to the facts sought to be proved.

**Note:** Whenever possible, the parties should explore the extent to which stipulations of fact may obviate the need for issuance of accounting board demands and requests to non-parties, and the hearing officer or other person ruling on an application for issuance of an accounting board demand or request should encourage the parties to reach such stipulations when possible.

##### (4) Witness Fees

A witness, other than a party, who is summoned to a Board proceeding pursuant to an accounting board demand, or an accounting board request, or who is deposed pursuant to Rule 5425, shall be paid his or her reasonable expenses by the party at whose instance the witness appears.

#### Rule 5425T. Depositions To Preserve Testimony for Hearing

##### (a) Procedure

Any party desiring to take the testimony of a witness by deposition shall make a written motion setting forth the reasons why such deposition should be taken including the specific reasons why the party believes the witness will be unable to attend or testify at the hearing; the name and address of the prospective witness; the matters concerning which the prospective witness is expected to be questioned; and the proposed time and place for the taking of the deposition.

**Note:** Depositions under the Rules of Board Procedure are used only to preserve testimony of a witness who would be unlikely to be able to attend the hearing. They are not permitted for purposes of discovery.

##### (b) Required Finding When Ordering a Deposition

In the discretion of the Board or the hearing officer, an order for deposition may be issued upon a finding that the prospective witness will likely give testimony material to the proceeding, that it is likely the prospective witness will be unable to attend or testify at the hearing because of age, sickness, infirmity, imprisonment or other disability, or otherwise unavailable, and that the taking of a deposition will serve the interests of justice.

##### (c) Procedure at Depositions

A witness whose testimony is taken by deposition shall be sworn or shall affirm before any questions are put to him or her. Examination and cross-examination of deponents may proceed

as permitted at a hearing. The witness being deposed may have counsel present during the deposition.

(d) Objections to Questions or Evidence

Objections to questions or evidence shall be in short form, stating the grounds of objection relied upon. Objections to questions or evidence shall be noted in the transcript, but no person other than the hearing officer shall have the power to decide on the competency, materiality or relevance of evidence. Failure to object to questions or evidence during the deposition shall not be deemed a waiver unless the ground of the objection is one that might have been obviated or removed if presented at that time.

(e) Filing of Depositions

The questions propounded and all answers or objections shall be recorded or transcribed verbatim, and a transcript prepared by the deposition officer, or under his or her direction. The transcript shall be subscribed by the witness and certified by the deposition officer. The original deposition and exhibits shall be filed with the Secretary. A copy of the deposition shall be available to the deponent and each party for purchase at prescribed rates.

Rule 5426T. Prior Sworn Statements of Witnesses in Lieu of Live Testimony

At a hearing, any person wishing to introduce a prior, sworn statement of a nonparty witness otherwise admissible in the proceeding, in lieu of live testimony may make a motion setting forth the reasons therefor. If only part of a statement is offered in evidence, the hearing officer may require that all relevant portions of the statement be introduced. If all of a statement is offered in evidence, the hearing officer may require that portions not relevant to the proceeding be excluded. A motion to introduce a prior sworn statement in lieu of live testimony may be granted if—

- (a) The witness is dead;
- (b) the witness is out of the United States, unless it appears that the absence of the witness was procured by the party offering the prior sworn statement;
- (c) the witness is unable to attend or testify because of age, sickness, infirmity, imprisonment or other disability;
- (d) the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand; or,
- (e) in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be

used. In making this determination, due regard shall be given to the presumption that witnesses will testify orally in an open hearing. If the parties have stipulated to accept a prior sworn statement in lieu of live testimony, consideration shall also be given to the convenience of the parties in avoiding unnecessary expense.

Rules 5427.–5439. [Reserved]

Conduct of Hearings

Rule 5440T. Record of Hearings

(a) Recordation

All hearings shall be recorded and a written transcript thereof shall be prepared.

(b) Availability of a Transcript

Transcripts of public hearings shall be available for purchase at prescribed rates. Transcripts of nonpublic proceedings shall be available for purchase only by parties, provided, however, that any person compelled to testify at a hearing may purchase a copy of that person's own testimony.

(c) Transcript Correction

Prior to the filing of post-hearing briefs or other submissions, or within such earlier time as directed by the Board or the hearing officer, a party or witness may make a motion to correct the transcript. Proposed corrections of the transcript may be submitted to the hearing officer by stipulation or by motion. Upon notice to all parties to the proceeding, the hearing officer may, by order, specify corrections to the transcript.

Rule 5441T. Evidence: Admissibility

The Board or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.

Rule 5442T. Evidence: Objections and Offers of Proof

(a) Objections

Objections to the admission or exclusion of evidence must be made on the record and shall be in short form, stating the grounds relied upon. Exceptions to any ruling thereon by the hearing officer need not be noted at the time of the ruling. Such exceptions will be deemed waived on appeal to the Board, however, unless raised—

- (1) pursuant to interlocutory review in accordance with Rule 5461;
- (2) in a proposed finding or conclusion filed pursuant to Rule 5445; or
- (3) in a petition for Board review of an initial decision filed in accordance with Rule 5460.

(b) Offers of Proof

Whenever evidence is excluded from the record, the party offering such evidence may make an offer of proof, which shall be included in the record. Excluded material shall be retained pursuant to Rule 5202(b).

Rule 5443T. Evidence: Presentation Under Oath or Affirmation

A witness at a hearing for the purpose of taking evidence shall testify under oath or affirmation.

Rule 5444T. Evidence: Presentation, Rebuttal and Cross-examination

In any proceeding, a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The scope and form of evidence, rebuttal evidence, if any, and cross-examination, if any, shall be determined by the Board or the hearing officer in each proceeding.

Rule 5445T. Post-Hearing Briefs and Other Submissions

(a) At the end of the hearing in any proceeding instituted pursuant to Rule 5200(a)(1), Rule 5200(a)(2), or Rule 5500 in which an initial decision is to be issued, the hearing officer shall, by order, after consultation with the parties, prescribe the period within which post-hearing briefs or other submissions are to be filed. Unless the hearing officer, for good cause shown, permits a different period and sets forth in the order the reasons why the different period is necessary—

- (i) the party or parties directed to file first shall make its or their initial filing within 30 days of the end of the hearing; and
- (ii) the total period within which all such filings and any opposition and reply submissions are to be filed shall be no longer than 90 days after the end of the hearing.

Rules 5446.–5459. [Reserved]

Appeals to the Board

Rule 5460T. Board Review of Determinations of Hearing Officers

(a) Petition for Review of Initial Decision by Hearing Officers

Any party to a hearing may obtain Board review of an initial decision by filing a petition for review that—

- (1) sets forth specific findings and conclusions of the initial decision as to which exception is taken, together with the supporting reasons for each exception; and



(2) is filed, in a proceeding instituted pursuant to Rule 5500, within 30 days after service of the initial decision on the petitioner or within 10 days after the filing of a petition for review by another party, whichever is later.

(b) Review on Board's Initiative

The Board may, on its own initiative, order review of any initial decision, or a portion of any initial decision, at any time before the initial decision becomes final pursuant to Rule 5204(d).

(c) De Novo Review

Based on a petition for review, or on its own initiative, the Board may affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part, an initial decision by a hearing officer and may make any findings or conclusions that in its judgment are proper based on the record.

(d) Limitations on Matters Reviewed

Review by the Board of an initial decision shall be limited to the issues specified in the petition for review or the issues, if any, specified in the briefing schedule order issued pursuant to Rule 5462(a). On notice to all parties, however, the Board may, at any time prior to issuance of its decision, raise and determine any other matters that it deems material, with opportunity for oral or written argument thereon by the parties.

(e) Summary Affirmance

The Board may summarily affirm an initial decision based upon the petition for review and any response thereto, without further briefing, if it finds that no issue raised in the petition for review warrants further consideration by the Board.

Rule 5461T. Interlocutory Review

(a) Availability

The Board will not review a hearing officer's ruling prior to its consideration of the entire proceeding in the absence of extraordinary circumstances. The Board may decline to consider a ruling certified by a hearing officer pursuant to paragraph (c) of this Rule if it determines that interlocutory review is not warranted or appropriate under the circumstances. The Board may, at any time, on its own motion, direct that any matter be submitted to it for review.

(b) Certification Process

A ruling submitted to the Board for interlocutory review shall be certified in writing by the hearing officer as appropriate for interlocutory review and shall specify the basis for certification.

The hearing officer shall certify a ruling only if—

(1) The ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody; or

(2) upon application by a party, within five days of the hearing officer's ruling, the hearing officer is of the opinion that—

(i) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion; and

(ii) an immediate review of the order may materially advance the completion of the proceeding.

(c) Proceedings Not Stayed

The filing of an application for interlocutory review or the grant of interlocutory review shall not stay proceedings before the hearing officer unless he or she, or the Board, shall so order. The Board will not consider the motion for a stay unless the motion has first been made to the hearing officer.

Rule 5462T. Briefs Filed With the Board

(a) Briefing Schedule Order

Upon a timely and valid petition for review, or upon its own timely motion to review an initial decision, other than review ordered pursuant to Rule 5469, the Board shall issue a briefing schedule order directing the parties to file opening briefs and specifying particular issues, if any, as to which briefing should be limited or directed. Unless otherwise provided, opening briefs shall be filed within 40 days of the date of the briefing schedule order. Opposition briefs shall be filed within 30 days after the date opening briefs are due. Reply briefs may be filed within 14 days after the date opposition briefs are due. No briefs in addition to those specified in the briefing schedule order may be filed except with leave of the Board. The briefing schedule order shall be issued—

(1) At the time the Board orders review on its own initiative pursuant to Rule 5460(b), or orders interlocutory review on its own motion pursuant to Rule 5460; or

(2) within 21 days, or such longer time as provided by the Board, after—

(i) the last day permitted for filing a petition for review pursuant to Rule 5204(d);

(ii) certification of a ruling for interlocutory review pursuant to Rule 5461(c).

(b) Contents of Briefs

Briefs shall be confined to the particular matters at issue. Each

exception to the findings or conclusions being reviewed shall be stated succinctly. Exceptions shall be supported by citation to the relevant portions of the record, including references to the specific pages relied upon, and by concise argument including citation of such statutes, decisions and other authorities as may be relevant. If the exception relates to the admission or exclusion of evidence, the substance of the evidence admitted or excluded shall be set forth in the brief, in an appendix thereto, or by citation to the record. Reply briefs shall be confined to matters in opposition briefs of other parties.

(c) Length Limitation

Opening and opposition briefs shall not exceed 30 pages and reply briefs shall not exceed 15 pages, exclusive of pages containing the table of contents, table of authorities, and any addendum, except with leave of the Board.

Rule 5463T. Oral Argument Before the Board

(a) Availability

The Board, on its own motion or the motion of a party, may order oral argument with respect to any matter. Motions for oral argument with respect to whether to affirm all or part of an initial decision by a hearing officer shall be granted unless exceptional circumstances make oral argument impractical or inadvisable. The Board will consider appeals, motions and other matters properly before it on the basis of the papers filed by the parties without oral argument unless the Board determines that the presentation of facts and legal arguments in the briefs and record and the decisional process would be significantly aided by oral argument.

(b) Procedure

Requests for oral argument shall be made by separate motion accompanying the initial brief on the merits. The Board shall issue an order as to whether oral argument is to be heard, and if so, the time and place therefor. The grant or denial of a motion for oral argument shall be made promptly after the filing of the last brief called for by the briefing schedule. If oral argument is granted, the time fixed for oral argument shall be changed only by written order of the Board, for good cause shown. The order shall state at whose request the change is made and the reasons for any such change.

(c) Time Allowed

Unless the Board orders otherwise, not more than one half-hour per side will be allowed for oral argument. The

Board may, in its discretion, determine that several persons have a common interest, and that the interests represented will be considered a single side for purposes of allotting time for oral argument. Time will be divided equally among persons on a single side, *provided, however*, that by mutual agreement they may reallocate their time among themselves. A request for additional time must be made by motion filed reasonably in advance of the date fixed for argument.

**Note:** The term “side” is used in this Rule to indicate that the time allowed is afforded to opposing interests rather than to individual parties. If multiple parties have a common interest, they may constitute only a single side.

#### (d) Participation of Board Members

A member of the Board who was not present at the oral argument may participate in the decision of the proceeding, provided that the member has reviewed the transcript of such argument prior to such participation. The decision shall state whether the required review was made.

#### Rule 5464T. Additional Evidence

Upon its own motion or the motion of a party, the Board may allow the submission of additional evidence. A party may file a motion for leave to adduce additional evidence at any time prior to issuance of a decision by the Board. Such motion shall show with particularity that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence previously. Any other party may file a response to the motion within 5 days after the motion is filed, or such longer time as the Board may allow. The Board may accept or hear additional evidence, or it may remand or refer the proceeding to a hearing officer for the taking of additional evidence, as appropriate.

#### Rule 5465T. Record Before the Board

The Board shall determine each matter on the basis of the record.

##### (a) Contents of the Record

In proceedings for final decision before the Board, the record shall consist of—

(1) All items part of the hearing record below in accordance with Rule 5202(a);

(2) any petitions for review, cross-petitions or oppositions; and

(3) all briefs, motions, submissions and other papers filed on appeal or review.

##### (b) Transmittal of Record to Board

Within 14 days after the last date set for filing briefs or such later date as the Board directs, the Secretary shall transmit the record to the Board.

##### (c) Review of Documents Not Admitted

Any document offered in evidence but excluded by the hearing officer or the Board and any document marked for identification but not offered as an exhibit shall not be considered a part of the record before the Board on appeal but shall be transmitted to the Board by the Secretary if so requested by the Board. In the event that the Board does not request the document, the Secretary shall retain the document not admitted into the record until the later of—

(1) The date upon which the Board's order becomes final, or

(2) the conclusion of any Commission and judicial review of that order.

#### Rule 5466T. Reconsideration

##### (a) Scope of Rule

A party may file a motion for reconsideration of a final order issued by the Board.

##### (b) Procedure

A motion for reconsideration shall be filed within 10 days after service of the order complained of on each party, or within such time as the Board may prescribe upon motion of the person seeking reconsideration, if made within the foregoing 10-day period. The motion for reconsideration shall briefly and specifically state the matters of record alleged to have been erroneously decided, the grounds relied upon, and the relief sought. Except with permission of the Board, a motion for reconsideration shall not exceed 15 pages. No responses to a motion for reconsideration shall be filed unless requested by the Board.

Rule 5467.–5499. [Reserved]

#### Part 5—Hearings on Disapproval of Registration Applications

##### Rule 5500T. Commencement of Hearing on Disapproval of a Registration Application

The Board may commence a proceeding to determine whether to approve or disapprove a public accounting firm's application for registration when, based on review of an application for registration as a registered public accounting firm—

(a) The Board determines, pursuant to Rule 2106(b)(2)(ii), to provide the applicant with written notice of a hearing to determine whether to approve or disapprove the application; and

(b) within such period, as the Board permits, after the date of service of a notice of a hearing whether to approve or disapprove an application for registration pursuant to Rule 2106(b)(2)(ii), the public accounting firm served with such notice files with the Secretary a written request for a hearing date and a notice of appearance pursuant to Rule 5401(c), and includes with the request—

(1) A statement that the public accounting firm has elected not to treat the notice as a written notice of disapproval for purposes of Section 102(c) of the Act; and

(2) a statement describing with specificity why the public accounting firm believes that the Board should not issue a written notice of disapproval.

#### Rule 5501T. Procedures for a Hearing on Disapproval of a Registration Application

Proceedings instituted pursuant to Rule 5500 shall be subject to procedures as described in Parts 2 and 4 of Section 5 of the Board's Rules.

### II. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

In its filing with the Commission, the Board included statements concerning the purpose of, and basis for, the proposed rules and discussed any comments it received on the proposed rules. The text of these statements may be examined in the Commission's Public Reference Room and at the principal office of the PCAOB. The Board has prepared summaries, set forth in sections A, B and C below, of the most significant aspects of such statements as they relate to the proposed Temporary Hearing Rules.

#### A. Board's Statement of the Purpose of, and Statutory Basis for, the Proposed Rules

##### (a) Purpose

Section 102 of the Act prohibits accounting firms that are not registered with the Board from preparing or issuing, or playing a substantial role in the preparation or furnishing of, an audit report with respect to any issuer. Under Board rules previously approved by the Commission, the Board will not disapprove an application for registration without first giving the applicant an opportunity for a hearing. The purpose of the proposed temporary rules is to supply fair procedures and rules to govern the conduct of any such hearing. The proposed temporary rules consist of 41 rules and nine definitions. Each of the rules and definitions is discussed below.

**Rule 1001—Definitions**

Rule 1001(a)(ix)T defines “accounting board demand” as a command to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term only to identify demands made upon registered public accounting firms and associated persons of such firms. Under the Act, the Board has authority to require those firms and persons to provide any testimony or documents sought by the Board in furtherance of its responsibilities under the Act, and including in particular any testimony or documents that the Board considers relevant to an investigation.

Rule 1001(a)(x)T defines “accounting board request” as a request to produce documents and/or to appear at a certain time and place to give testimony. The rules use this term to distinguish the Board’s efforts to obtain documents and testimony from persons other than registered public accounting firms and their associated persons.

Rule 1001(c)(ii)T defines “counsel” as an attorney at law admitted to practice, and in good standing, before the Supreme Court of the United States or the highest court of any state.

Rule 1001(h)(i)T defines “hearing officer” to mean any person, other than a Board member or staff of the interested division, duly authorized by the Board to preside at a hearing.

Rule 1001(i)(iv)T defines “interested division” as a division or office of the Board assigned primary responsibility by the Board to participate in a particular proceeding. As a general matter, the interested division in a disciplinary proceeding will be the Division of Enforcement and Investigations, and the interested division in a hearing on disapproval of a registration application will be the Division of Registration and Inspections. The definition is adapted from Rule 101(a)(6) of the Commission’s Rules of Practice.

Rule 1001(o)(ii)T defines “order instituting proceedings” as an order issued by the Board commencing a disciplinary proceeding.

Rule 1001(p)(iii)T defines “party” as the interested division, any person named as a respondent in an order instituting proceedings or notice of a hearing, any applicant named in the caption of any order, or any person seeking Board review of a decision.

Rule 1001(p)(iv)T defines “person” as any natural person or any business, legal or governmental entity or association.

Rule 1001(s)(iii)T defines “Secretary” as the Secretary of the Board.

**Rule 1002T—Time Computation**

Rule 1002T describes the method by which the Board shall compute time for purposes of complying with deadlines in the Board’s rules.

**Rule 5200T—Commencement of Disciplinary Proceedings**

Rule 5200T(b) provides for an appointment of a hearing officer by the Board as soon as practicable after issuance of the order instituting proceedings or after a registration applicant has requested a hearing pursuant to Rule 5500T(b). The rule is adapted from NASD Rule 9213(a).

Under Rule 5200T(b), the Board shall notify the parties of the hearing officer’s assignment. The hearing officer shall have authority to do all things necessary and appropriate to discharge his or her duties, including, but not limited to, the matters specified in Rule 5200T(b). The rule expressly subjects the hearing officer’s authority to the limitations described in Rule 5402T (concerning hearing officer disqualification) and Rule 5403T (concerning ex parte communications).

Rule 5200T(c) provides that the Board will observe certain separation of functions principles. The rule provides that neither the staff of the Division of Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel. In addition, the rule provides that a hearing officer may not be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for the Board.

With respect to proceedings that involve a common question of law or fact, Rule 5200T(d) provides that the Board or a hearing officer may, by order, consolidate the proceedings for hearing of any or all matters at issue in the proceedings. The rule is adapted from Rule 201 of the Commission’s Rules of Practice. The rule provides that consolidation shall not prejudice any rights that any party may have under the Board’s Rules and shall not affect the right of any party to raise issues that could have been raised in the absence of consolidation.

**Rule 5201T—Notification of Commencement of Disciplinary Proceedings**

Rule 5201T(c) provides that, in the case of a hearing on a registration application commenced under Rule

5500T, the notice of hearing shall state proposed grounds for disapproving the registration application.

**Rule 5202T—Record of Disciplinary Proceedings**

Rule 5202T(a) describes the material that shall make up the contents of the record in a disciplinary proceeding (Rule 5202T(a)(1)) and the contents of the record on disapproval of an application for registration (Rule 5202T(a)(2)). Under Rule 5202T(b), any document offered as evidence but excluded, and any document marked for identification but not offered as an exhibit, shall not be considered part of the record but shall be maintained by the Secretary until all opportunities for Commission and judicial review have been exhausted or waived. Paragraphs (c)–(e) of Rule 5202T address the substitution of true copies for documents in the record, the preparation of the record and the certification of the record index, and the final transmittal of record items to the Secretary. The rule is adapted from Rules 350 and 351 of the Commission’s Rules of Practice.

**Rule 5203T—Public and Private Hearings**

Under Rule 5203T, a hearing on disapproval of a registration application shall be nonpublic unless the Board orders otherwise. The rule essentially creates a presumption that a hearing on disapproval of a registration application will be non-public. A disapproval hearing will, by its nature, involve a firm that is not yet a registered firm and may well involve a record that includes confidential information submitted as part of the registration application. The rule reserves to the Board the flexibility to make the hearing public if warranted by unusual circumstances. In any event, if the Board decides, after a hearing, to disapprove the application, that decision, along with the reasons for the decision, will be made public according to the provisions of Section 105(d) of the Act.

**Rule 5204T—Determinations in Disciplinary Proceedings**

Rule 5204T(b) provides that, unless the Board orders otherwise, the hearing officer shall prepare an initial decision following a hearing. The rule provides that the initial decision shall include findings and conclusions, including sanctions, if appropriate, and the reasons or basis therefore, as to all the material issues of fact, law, or discretion presented on the record and such other information as the Board may require.

The rule is adapted from Rule 360 of the Commission's Rules of Practice.

The note to Rule 5204T(b) sets out the Board's general expectations about the time frame within which a hearing officer should complete an initial decision in various types of cases. These time frames are nothing more than the Board's general expectations and do not create any right in any person to have an initial decision prepared within any particular period of time.

Rule 5204T(c) governs the hearing officer's filing of the initial decision with the Secretary and the Secretary's service of the initial decision on the parties.

Rule 5204T(d) provides the circumstances in which an initial decision of a hearing officer becomes the final decision of the Board as to a party. The rule is adapted from Rule 360(d) of the Commission's Rules of Practice. Rule 5204T(d)(1) provides that the initial decision becomes the Board's final decision as to a party upon issuance by the Secretary of a notice of finality. Rule 5204T(d)(2) provides that the Secretary shall issue the notice of finality no later than twenty days after the lapsing of the time period for filing a petition for Board review (as described in Rule 5460T), unless one of the two conditions described in Rule 5204T(d)(3) has occurred. Rule 5204T(d)(3) provides that the Secretary shall not issue a notice of finality as to any party who has filed a timely petition for Board review or with respect to whom the Board, on its own motion, has ordered review of the initial decision pursuant to Rule 5460T(b).

#### Rule 5205T—Settlement of Disciplinary Proceedings Without a Determination After Hearing

Rule 5205T governs certain matters related to possible settlement of disciplinary proceedings. The rule is adapted from Rule 240 of the Commission's Rules of Practice.

Rule 5205T provides that any person who is or is to be a party to a disciplinary proceeding may at any time propose in writing an offer of settlement. The rule imposes requirements for the content of the offer, and requires that it be signed by the person making the offer, not by counsel.

Rule 5205T(c)(1) requires that the Division Director the offer to the Board along with a recommendation concerning the offer, except that, if the recommendation is unfavorable, the Director shall not present the offer to the Board unless the person making the offer so requests.

Rules 5205T(c)(2)–(3) set out various matters that the person making the offer

must waive before the Board will consider the offer, including waiver of rights to hearings, rights to proposed findings of fact and conclusions of law, rights to proceedings before and an initial decision by a hearing officer, rights to post-hearing procedures, rights to judicial review, rights to have Board and Board staff observe separation of functions principles, and rights to claim bias or prejudice by the Board based on consideration of or discussions concerning the settlement offer.

Rule 5205T(c)(4) provides that if the Board rejects the offer, the offer will be deemed withdrawn and will not constitute a part of the record. Rule 5205T(c)(4) further provides that rejection of the offer will not affect the continued validity of waivers of rights to claim bias or prejudice on the basis of discussions concerning the settlement offer.

Rule 5205T(c)(5) provides that Board acceptance of an offer will occur only upon the issuance of findings and an order by the Board.

A note to Rule 5205T points out that in hearings on disapproval of registration, settlement offers will be handled by the Director of Registration and Inspections.

#### Rule 5400T—Hearings

Rule 5400T provides for hearings to be held only upon order of the Board and to be conducted in a fair, impartial, expeditious and orderly manner. The rule is adapted from Rule 200 of the Commission's Rules of Practice.

#### Rule 5401T—Appearance and Practice Before the Board

Rule 5401T provides that a person may appear on his own behalf before the Board or may be represented by counsel. Rule 5401T further provides that a member of a partnership may represent the partnership and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association. Rule 5401T(c) imposes certain procedural requirements related to representation and withdrawal.

#### Rule 5402T—Hearing Officer Disqualification and Withdrawal

Rule 5402T allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402T also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233.

#### Rule 5403T—*Ex Parte* Communications

Rule 5403T prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The rule also prohibits a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules. Rule 5403T(b) extends that restriction on *ex parte* communications not only to a party (including the interested division) but also to any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing.

#### Rule 5404T—Service of Papers by Parties

Rule 5404T requires service of papers on each party in a manner calculated to bring the paper to the attention of the party served.

#### Rule 5405T—Filing of Papers With the Board: Procedure

Rule 5405T governs procedures for filing papers with the Board.

#### Rule 5406T—Filing of Papers: Form

Rule 5406T governs the form of papers to be filed with the Board.

#### Rule 5407T—Filing of Papers: Signature Requirement and Effect

Rule 5407T requires every paper filed to be signed either by the party, if the party represents himself or herself, or by counsel if the party is represented by counsel. Because the Board expects most papers to be filed electronically, a note to the rule states that the signature should be scanned into an electronic document where practicable, but that otherwise certain indicia of electronic signature will suffice.

#### Rule 5408T—Motions

Rule 5408T describes procedures and length limitations related to motions and supporting briefs.

#### Rule 5409T—Default and Motions To Set Aside Default

Rule 5409T describes the circumstances that shall constitute a default and the procedure for seeking to set aside a default. The rule is adapted from Rule 155 of the Commission's Rules of Practice.

#### Rule 5410T—Extra Time for Service by Mail

Rule 5410T allows an additional three days, with respect to any computation of time, for service made by mail.

### Rule 5411T—Modifications of Time, Postponements and Adjournments

Rule 5411T provides that the Board maintains discretion, except as otherwise provided by law, to adjust the time limits prescribed by the rules or to postpone or adjourn any hearing.

### Rule 5420T—Leave to Participate To Request a Stay

Rule 5420T provides a procedure by which certain entities may seek a stay of a hearing. The entities that may seek such a stay would have been the Commission, the United States Department of Justice or any United States Attorney's Office, any criminal prosecutorial authority of a state or political subdivision of a state, and an appropriate state regulatory authority may seek a stay.

Under Rule 5420T, an authorized representative of any such entity may seek leave to participate on a limited basis to request a stay. Rule 5420T provides that a stay shall be granted upon a showing that a stay is necessary to protect an ongoing Commission investigation, and that a stay shall otherwise be favored upon a showing that it is in the public interest or for the protection of investors.

### Rule 5421T—Answer to Allegations

Rule 5421T governs the filing of answers to orders instituting proceedings. A party may file an answer in any matter, but is not required to file an answer unless ordered to do so in the order instituting proceedings.

### Rule 5422T—Availability of Documents for Inspection and Copying

Rule 5422T governs the obligations of Board staff to make documents available to a party for inspection and copying. Paragraphs (a) through (c) of Rule 5422T are the core provisions for determining what documents the staff must make available. Paragraph (a) describes generally the documents that the staff must make available to a respondent. Paragraph (b) limits paragraph (a) by describing categories of documents that the staff may withhold, subject to an overriding obligation not to withhold material exculpatory evidence. Paragraph (c) prescribes procedures the staff must follow when withholding certain categories of documents, and procedures for a hearing officer to determine whether withholding is appropriate.

Rule 5422T(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500T. Rule 5422T(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the

Division in connection with the registration application prior to the notice of hearing.

Rule 5422T(a) includes specific exceptions for, and must be read in conjunction with, Rule 5422T(b), which describes four categories of documents that the Division may withhold from a respondent even if Rule 5422T(a) would otherwise require the Division to make the document available. Moreover, withholding documents may trigger the procedural requirements of Rule 5422T(c). We therefore individually address each of the four categories of documents that may be withheld under Rule 5422T(b), and any Rule 5422T(c) procedures related to withholding those documents.

Under Rule 5422T(b)(1)(i), the Division need not make available any document prepared by a member of the Board or the Board's staff that has not been disclosed to any person other than Board members, Board staff, or persons retained by the Board or Board staff to provide services in connection with the investigation, disciplinary proceeding, or hearing on disapproval of registration. Withholding such documents does not trigger any procedural requirements under Rule 5422T(c).

Under Rule 5422T(b)(1)(ii), the Division need not make available any other document that, while not encompassed within the first category, is nevertheless protected by a privilege or by the attorney work product doctrine. This category would include, for example, documents that were privileged in the hands of the person who supplied them to the Board, but who supplied them pursuant to an understanding that doing so would not otherwise waive the privilege. As to this category of withheld documents, Rule 5422T(c)(1) requires the Division to supply to the hearing officer and each respondent a log providing all of the same information that Rule 5106 requires a person to submit when asserting a privilege against production to the Board.<sup>1</sup>

<sup>1</sup> Rule 5106, adopted by the Board on September 29, 2003, is currently pending before the Commission for approval and will not take effect unless the Commission approves it. If Rule 5422T(c)(1) takes effect on a temporary basis before Rule 5106 takes effect, the portions of Rule 5106 that are incorporated by reference in Rule 5422T(c)(1) shall be given effect as part of Rule 5422T(c)(1) as fully as if they were expressly restated therein. The Commission notes that Board staff has confirmed that the specific language of Rule 5106 that is intended to be given effect as part of Rule 5422T(c)(1) is the language in Rule 5106(a) that requires that,

(1) the person asserting the privilege, or his or her attorney, shall identify the nature of the privilege (including attorney work product) that is being

Under Rule 5422T(b)(1)(iii), the Division need not make available any document that would disclose the identity of a confidential source. The rule provides, however, that the staff may not withhold a document on this basis if doing so results in withholding material exculpatory evidence. Rule 5422T(c)(2) requires the Division to provide the hearing officer with a list of any documents withheld to protect the identity of a confidential informant. The rule requires the Division to provide the same list to each respondent, although the staff may redact as much information as necessary from that list (including, in appropriate circumstances, all information) to protect the interests related to the Division's reason for withholding the document. The hearing officer, in his or her discretion, may review any such document *in camera* to assess the grounds for withholding it and to assess whether it includes material exculpatory evidence.

Under Rule 5422T(b)(1)(iv), the Division need not make available any other document that the staff identifies for the hearing officer's consideration as to whether the document may be withheld as not relevant to the subject matter of the proceeding or otherwise for good cause shown. For example, the staff might have documents supplied by a foreign regulator under a confidentiality agreement. If the staff does not intend to use them, the "good cause" exception allows the staff to withhold them to honor the confidentiality agreement. Again, however, the good cause exception does not allow the staff to withhold a document that contains material exculpatory evidence. Rule 5422T(c)'s

claimed and indicate the relevant jurisdiction's privilege rule being invoked; and

(2) the following information shall be provided in the objection, unless divulgence of such information would cause disclosure of the allegedly privileged information—

(i) for documents: (A) the type of document, (e.g., letter or memorandum); (B) the general subject matter of the document; (C) the date of the document; and (D) such other information as is sufficient to identify the document for a Commission subpoena duces tecum, including, where appropriate, the author of the document, the addressees of the document, and any other recipients shown in the document, and, where not apparent, the relationship of the author, addressees, and recipients to each other; and

(ii) for oral communications: (A) the name of the person making the communication and the names of persons present while the communication was made and, where not apparent, the relationship of the persons present to the person making the communication; (B) the date and place of communication; and (C) the general subject matter of the communication. (Telephone conversation between Gordon Seymour, Acting General Counsel, PCAOB, and staff of the Commission's Office of the Chief Accountant, on November 4, 2003.)

procedures, described above with respect to confidential informant documents, apply in the same fashion to documents withheld as irrelevant or otherwise for good cause.

In addition to the procedural protections described above, Rule 5422T(b)(2) provides an over-arching restriction on what the Division may withhold. It provides that nothing in paragraph (b) authorizes the interested division to withhold non-privileged documents that contain material exculpatory evidence.

Rule 5422T(d) governs the time period in which the staff must make the documents available. Under the rule, the staff must make the documents available within 14 days of the institution of proceedings under Rule 5500.

Rule 5422T(e) provides that the staff shall make the documents available at the Board's office where the documents are normally maintained, or at such other place as the parties agree upon in writing. Rule 5422T(d) further provides that, except as subject to any specific contrary agreement with the staff, a party shall not have custody of the documents and shall not remove the documents from the Board's offices, though the party may make and retain copies of the documents. Rule 5422T(f) provides that a party wishing to make copies of the documents must bear the cost of copying.

Rule 5422T(g) addresses any failure by the interested division to make available any document that these rules required it to make available. The rule provides that, in that event, no person shall be entitled to a rehearing or redetermination in a matter already heard or decided unless that person first establishes that the failure to make the document available did not constitute harmless error.

A note following Rule 5422T points out that the obligations of the interested division under this rule extend only to documents obtained by that division, and that this Rule does not require the interested division to make available documents located only in the files of other divisions or offices. The proviso, however, is not intended to relieve the interested division of the obligation to make available any such document that the division knows of and intends to introduce as evidence. Any such document should be treated, for purposes of Rule 5422T, just as if it were physically located in the division's files.

#### Rule 5423T—Production of Witness Statements

Rule 5423T(a) provides that a respondent may move that the interested division produce any statement of a person, called or to be called as a witness by the division, that pertains or is expected to pertain to his or her direct testimony and that would be required to be produced pursuant to the Jencks Act, 18 U.S.C. 3500, if the Board were a governmental entity. The hearing officer shall have authority to grant such a motion and require production of any such statement. Rule 5423T(b) provides, however, that the interested division's failure to produce any such statement shall not be grounds for rehearing or redetermination of a matter already heard or decided unless the respondent first establishes that the failure to produce the statement was not harmless error. The rule is based on Rule 231 of the Commission's Rules of Practice.

#### Rule 5424T—Accounting Board Demands

Rule 5424T provides for mechanisms by which any party may seek to secure testimony or evidence relevant to a proceeding. Rule 5424T(a) describes procedures by which any party may seek to have an accounting board demand served on any registered public accounting firm or associated person of such a firm, or seek to have an accounting board request served on any other person. Under the rule, the party must make a request to the hearing officer for issuance of the accounting board demand or accounting board request. In the event of the hearing officer's unavailability, the party may present its request, through the Secretary, to any member of the Board, or any other person designated by the Board to issue such demands and requests.

The application for an accounting board demand or accounting board request may be denied, or may be granted with modifications, if it is unreasonable, oppressive, excessive in scope, or unduly burdensome. The rule provides that a person whose application for an accounting board demand or accounting board request has been denied or modified may not make the same application to another person and may not apply to the Board for a Commission subpoena covering the same testimony, documents, or information as the denied application covered or as was excluded by modification in granting an application. Rule 5424T(a) also provides that a party who applies for an accounting board

demand or accounting board request to summon a witness shall pay the witness's reasonable expenses.

#### Rule 5425T—Depositions To Preserve Testimony for Hearing

Rule 5425T provides procedures by which a party may seek a deposition for the purpose of preserving for a hearing the testimony of a person who may be unavailable to appear at the hearing. Rule 5425T does not provide for depositions taken for the purpose of discovery. The rule is adapted from Rule 233 of the Commission's Rules of Practice.

Under Rule 5425T(a), a party seeking to take a deposition to preserve testimony must make a written motion setting out the reasons why the deposition is necessary and specifically including the reasons that the party believes the witness will be unable to testify at the hearing. The motion must also identify the witness, the matters on which the party intends to question the witness, and the proposed time and place of the deposition. Under Rule 5425T(b), the hearing officer may grant the motion if the hearing officer finds that the witness will likely give testimony material to the proceeding, that it is likely the witness will be unable to appear at the hearing because of age, sickness, infirmity, imprisonment or other disability, or will otherwise be unavailable, and that the taking of the deposition will serve the interests of justice. Rules 5425T(c)–(e) describe certain procedures governing any such deposition allowed by the hearing officer.

#### Rule 5426T—Prior Sworn Statements of Witnesses in Lieu of Live Testimony

Rule 5426T provides procedures by which a party may introduce into evidence a witness's prior sworn statement in lieu of live testimony by the witness. Rule 5426T is not a limitation on any party's ability to introduce a prior sworn statement with respect to a witness who appears in person and testifies (for purposes of impeachment, for example). But Rule 5426T does limit the circumstances in which a party may introduce a prior sworn statement in lieu of live testimony by the witness.

Rule 5426T identifies five circumstances in which the hearing officer may grant a motion to introduce a prior sworn statement in lieu of live testimony: (1) If the witness is dead, (2) if the witness is outside of the United States, unless it appears that the witness's absence from the country was procured by the party offering the prior sworn statement, (3) if the witness is

unable to attend because of age, sickness, infirmity, imprisonment or other disability, (4) if the party offering the prior sworn statement has been unable to procure the attendance of the witness by accounting board demand, or (5) if, in the discretion of the Board or the hearing officer, it would be desirable, in the interests of justice, to allow the prior sworn statement to be used. In granting a motion to introduce a prior sworn statement, a hearing officer has the discretion, under Rule 5426T, to require that all relevant portions of the statement be included or to exclude portions of the statement not relevant to the proceeding.

#### Rule 5440T—Record of Hearings

Rule 5440T describes procedures related to the creation, correction, and availability of hearing transcripts.

#### Rule 5441T—Evidence: Admissibility

Rule 5441T provides that a hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious. The standard in Rule 5441T is based on the Administrative Procedures Act.<sup>2</sup> In addition, the same standard is used in the SEC's Rules of Practice.<sup>3</sup> By using this phrase in Rule 5441T, the Board intends for evidentiary issues in PCAOB hearings to be addressed in a generally similar manner to SEC administrative hearings, and the administrative hearings of most other administrative agencies. Rule 5441T is not intended to limit a hearing officer's authority to exclude or allow evidence based on reasonable principles of admissibility, but is intended to allow a hearing officer reasonable flexibility.<sup>4</sup> In particular, the three bases in the rule—irrelevance, immateriality, and undue repetition—are not the only permissible bases on which a hearing officer may exclude evidence under administrative practice. Nor does the standard in Rule 5441T preclude a hearing officer from referring to principles from the Federal Rules of Evidence or other authoritative sources in exercising his or her discretion to resolve evidentiary issues.<sup>5</sup>

#### Rule 5442T—Evidence: Objections and Offers of Proof

Rule 5442T(a) provides that any objections must be made on the record and must be in short form, stating the grounds relied upon. Under Rule 5442T(a) any exception to a hearing officer's ruling on an objection need not be noted at the time of the ruling but will be deemed waived on appeal to the Board unless the exception was raised (1) on interlocutory review under Rule 5461T, (2) in a proposed finding or conclusion filed under Rule 5445T, or (3) in a petition for Board review of an initial decision filed under Rule 5460T. Rule 5442T(b) provides that when evidence is excluded from the record, the party offering the evidence may make an offer of proof which shall be included in the record. The excluded material itself would be retained under Rule 5202T(b).

#### Rule 5443T—Evidence: Presentation Under Oath or Affirmation

Rule 5443T provides that witnesses at a hearing shall testify under oath or affirmation.

#### Rule 5444T—Evidence: Rebuttal and Cross-Examination

Rule 5444T provides that a party may present its case or defense by oral or documentary evidence, submit rebuttal evidence, and conduct such cross-examination as, in the discretion of the Board or the hearing officer, may be required for a full and true disclosure of the facts. The rule provides that the Board or hearing officer shall determine the scope and form of evidence, rebuttal evidence, and cross-examination in any proceeding. The rule is adapted from Rule 326 of the Commission's Rules of Practice.

#### Rule 5445T—Post-Hearing Briefs and Other Submissions

Rule 5445T provides procedures relating to the submission of post-hearing briefs and other submissions.

#### Rule 5460T—Board Review of Determinations of Hearing Officers

Rule 5460T concerns Board review of initial decisions. Under Rule 5460T, a party may obtain Board review of an initial decision by filing a timely petition setting forth specific findings and conclusions of the initial decision to which the party takes exception and setting forth the supporting reasons for each exception. To be timely, a petition must be filed within 30 days of an initial decision in proceedings on disapproval of a registration application. The rule is based in part on Rule 410 of the Commission's Rules of Practice.

Also under Rule 5460T(a), if one party submits a timely petition for review, any other party then has an additional ten days to submit its own petition for review, even if its petition raises different issues than those raised by the first party to submit a petition. The purpose of this rule is to avoid the unnecessary expenditure of Board resources in cases where no party would appeal if it knew that the other party would not appeal, but in which one or more parties nevertheless appeal because of a concern that failing to appeal will deprive it of the opportunity to raise its issues in any appeal lodged by another party. Under Rule 5460T(a), no party need guess about the other party's intentions, and no party sacrifices anything by waiting to see whether another party files a timely petition for review.

Rule 5460T(b) provides that the Board may, on its own initiative, order review of all or any portion of an initial decision even if no party seeks review. The Board may order such review, however, only if it does so before the initial decision would otherwise become the final decision of the Board pursuant to the operation of Rule 5204T(c). In effect, this allows the Board to order review on its own initiative for a period of 20 days beyond the deadline for a party to petition for review. The rule is based in part on Rule 411 of the Commission's Rules of Practice. Rules 5460T(c)–(e) set out procedural matters related to Board review.

#### Rule 5461T—Interlocutory Review

Rule 5461T concerns Board interlocutory review of hearing officer rulings. Under Rule 5461T(a), the Board will not grant interlocutory review absent extraordinary circumstances, but also may direct at any time that any matter or ruling be submitted to the Board for review. Rule 5461T(b) provides that a hearing officer shall certify a ruling for interlocutory review only if (1) the ruling would compel testimony of Board members, officers or employees or the production of documentary evidence in their custody, or (2) the ruling involves a controlling question of law as to which there is substantial ground for difference of opinion and immediate review of the order may materially advance completion of the proceeding. Rule 5461T(c) provides that neither an application for, nor the granting of, interlocutory review shall stay the proceeding unless otherwise ordered by the hearing officer or the Board. The rule is adapted from Rule 400 of the Commission's Rules of Practice and 28 U.S.C. 1292(b).

<sup>2</sup> 5 U.S.C. 556(c)(3) and (d).

<sup>3</sup> See SEC Rule of Practice 320, 17 C.F.R. § 201.320 ("The Commission or the hearing officer may receive relevant evidence and shall exclude all evidence that is irrelevant, immaterial or unduly repetitious.").

<sup>4</sup> See, e.g., Commission Opinion: Wheat, First Securities, Inc.; Rel. No. 34-48378, (August 20, 2003) (holding that hearsay is admissible in an SEC administrative hearing, but noting that the "record shows the probative and reliable nature of this evidence").

<sup>5</sup> See *id.* (explaining that same result would have been reached had the administrative law judge applied the Federal Rules of Evidence).



**Rule 5462T—Briefs Filed With the Board**

Rule 5462T describes procedural requirements related to briefs and the filing of briefs. The rule is adapted from Rule 450 of the Commission's Rules of Practice.

**Rule 5463T—Oral Argument Before the Board**

Rule 5463T concerns oral argument before the Board. Under Rule 5463T(a), the Board may order oral argument, with or without the motion of a party, on any matter. The rule provides that, in general, motions for oral argument will be granted unless exceptional circumstances make oral argument impractical or inadvisable. Rules 5463T(b)–(c) provide for procedures relating to oral argument. Rule 5463T(d) provides that a member of the Board who is not present for oral argument may nevertheless participate in the Board's decision as long as the Board member reviews a transcript of the argument before participating in the decision.

**Rule 5464T—Additional Evidence**

Rule 5464T provides that the Board may, upon its own motion or the motion of a party, allow the submission of additional evidence in connection with the Board's review of an initial decision. The rule is adapted from Rule 452 of the Commission's Rules of Practice.

**Rule 5465T—Record Before the Board**

Rule 5465T provides that the Board shall determine each matter on the basis of the record and provides certain requirements concerning the record. The rule is adapted from Rule 460 of the Commission's Rules of Practice.

**Rule 5466T—Reconsideration**

Rule 5466T provides procedures by which a party may seek reconsideration of a Board decision. The rule is adapted from Rule 470 of the Commission's Rules of Practice.

**Rule 5469T—Board Consideration of Actions Made Pursuant to Delegated Authority**

Rule 5469T provides procedures relating to Board consideration of petitions for review of actions made pursuant to authority delegated by the Board. Rule 5469T(a) provides that the Board may act summarily on the basis of the petition, or on the basis of the petition and any staff response, or may require additional statements in support of or opposition to the petition. Rule 5469T(b) provides that the effect of any staff action would not be stayed pending any petition for review of that action.

**Rule 5500T—Commencement of Hearing on Disapproval of a Registration Application**

Rule 5500T describes the procedure relating to the commencement of a Board adjudication proceeding to consider an application for registration. Under the Board's registration rules, if the Board is unable to make the determination necessary to approve a registration application, the Board will provide the applicant with notice of a hearing. Rule 5500T provides the procedures through which such a proceeding would be commenced.

Specifically, Rule 5500T provides that a proceeding would commence after the Board provides a notice of hearing under Rule 2106(b)(2)(ii) and the applicant timely files a request for a hearing date and notice of appearance, rather than opting to treat the Board's notice of hearing as a denial of the application. Under Rule 5500T(b), a request for hearing must include a statement that the applicant has elected not to treat the notice of hearing as a disapproval of its application and a statement describing with specificity why the applicant believes that the Board should not disapprove the application.

**Rule 5501T—Procedures for a Hearing on Disapproval of a Registration Application**

Rule 5501T provides that proceedings commenced pursuant to Rule 5500T are subject to the procedures set out in Parts 2 and 4 of Section 5 of the Board's rules.

**(b) Statutory Basis**

The statutory basis for the proposed rules is Title I of the Act.

***B. Board's Statement on Burden on Competition***

The Board does not believe that the proposed rules will result in any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act. The proposed temporary rules supply procedures for the conduct of fair hearings. Moreover, the proposed temporary rules would apply only in the context of a hearing that an applicant for registration elects, at its option, to have.

***C. Board's Statement on Comments on the Proposed Rules Received From Members, Participants or Others***

The Board published the Enforcement Rules, including the rules that constitute the Temporary Hearing Rules, for public comment in PCAOB Release No. 2003–012 (July 28, 2003). A copy of PCAOB Release No. 2003–012 and the comment letters received in response to

the PCAOB's request for comment are available on the PCAOB's Web site at <http://www.pcaobus.org>. The Board received 17 written comments. The Board has clarified and modified certain aspects of the rules that constitute the Temporary Hearing Rules in response to comments it received, as discussed below.

The Board proposed to define the term "hearing officer" to include a panel of Board members constituting less than a quorum of the Board, an individual Board member, or any other person duly authorized by the Board to preside at a hearing. Several commenters expressed the view that neither Board members nor staff of the interested division should ever serve as hearing officers. We never intended to permit staff of the interested division to serve as hearing officers, and we have revised the rule to exclude that possibility. Nor did we intend to provide for a Board member to serve as a hearing officer except in an extraordinary situation, and we are now persuaded that the rule should exclude that possibility as well. In general, we intend to rely on a corps of qualified persons whose service to the Board is strictly limited to the role of hearing officer. We may rely on consultants for this purpose, or we may employ a staff of hearing officers, or we may rely on a combination of the two.

Rule 5200T(c) provides that the Board will observe certain separation of functions principles. The proposed rule provided that any Board employee or agent engaged in investigative or prosecutorial functions for the Board in a proceeding could not, in that same proceeding or a factually related proceeding, participate or advise in the decision, or in Board review of the decision, except as a witness or counsel in the proceeding. One commenter suggested that this rule should clearly exclude all enforcement personnel from participating in the adjudication of a disciplinary proceeding, whether or not they had an investigative or prosecutorial role in the matter. We are persuaded that this represents a good policy choice and we have revised the rule accordingly. The final rule provides that neither the staff of the Division of Enforcement and Investigations, nor any other staff who engaged in investigative or prosecutorial functions on a matter, may participate or advise in the decision, or the review of the decision, except as a witness or counsel.

Rule 5401T provides that a person may appear on his own behalf before the Board or may be represented by counsel and imposes certain procedural requirements related to representation



and withdrawal. The proposed rule provided that an individual's withdrawal from representation of a party would be permitted only with the approval of the Board or the hearing officer. One commenter suggested that it would be helpful if the rules would enumerate grounds that would be adequate for withdrawal. Other commenters suggested that the rules should provide that permission to withdraw would not be unreasonably withheld. One commenter suggested that a party's request to replace counsel (as distinct from counsel's request to withdraw) should not require approval.

We are sensitive to the importance of counsel being free to withdraw in appropriate circumstances, and the importance of a party being free to change counsel in appropriate circumstances. We are also mindful of the ways in which an ostensible desire to withdraw or to change counsel can be used to delay or disrupt proceedings. To provide some assurance of the limited scope within which we intend for the Board or hearing officer to withhold permission to withdraw, we have adopted the suggestion of those commenters who urged that the rule provide that permission to withdraw would not be unreasonably withheld.

Rule 5402T allows a party to make a motion for withdrawal of a hearing officer and governs the circumstances under which such a motion may be made and the time within which it must be made. Rule 5402T also provides for appointment of a replacement hearing officer in the event of withdrawal or disqualification. The rule is based on Rule 112 of the Commission's Rules of Practice and NASD Rule 9233. Commenters suggested that the rule should provide for a right of immediate interlocutory appeal to the Board from a hearing officer's denial of a recusal motion. One commenter stated that this was of particular importance given the possibility that Board staff, including enforcement staff, might be assigned to serve as hearing officers.

As discussed earlier, we have revised the definition of "hearing officer" to provide that neither a Board member nor any staff of the interested division will serve as a hearing officer. We decline to create a special right of interlocutory Board review in every case of a denied recusal motion. The interlocutory appeal process, governed by Rule 5461T, allows a party to request that the hearing officer certify his or her recusal ruling for interlocutory review. The rule requires that the hearing officer should certify the ruling if immediate review of the order may materially advance the completion of the

proceeding. Given that a reversible denial of a recusal motion could substantially delay completion of the proceeding by eventually requiring a complete re-hearing before a different hearing officer, we expect hearing officers to give careful attention to whether that standard for certification has been met with respect to any ruling denying a recusal motion.

One commenter suggested that the rule should provide that, if a hearing officer is replaced, the parties should have a right to move that certain testimony be reheard so that the new hearing officer may judge credibility. We believe that the rules as proposed and adopted are flexible enough to accommodate such a motion and to leave the decision within the discretion of the new hearing officer.

Rule 5403T prohibits a hearing officer from having *ex parte* communications with a person or party, except to the extent permitted by law or by the Board's rules for the disposition of *ex parte* matters. The proposed rule also prohibited a party from having *ex parte* communication with the Board or any Board member on a fact in issue, except as permitted by law or by the Board's rules. Commenters suggested that the restriction should extend beyond the interested division to any Board staff that has had substantial involvement in a matter. We have revised Rule 5403T(b) to impose the restriction not only on a party (including the interested division) but also on any Board staff that substantially assists the interested division on the particular matter, whether before or during the hearing.

Rule 5422T(a)(3) applies to registration disapproval proceedings commenced pursuant to Rule 5500T. Rule 5422T(a)(3) requires the Division of Registration and Inspections to make available all documents obtained by the Division in connection with the registration application prior to the notice of hearing, and specifies the categories of documents that the Division may withhold from production. In response to comments, we have revised the proposed rule to provide more clearly that nonprivileged documents that include material, exculpatory evidence may not be withheld even if they otherwise fall into one of the categories of documents that may be withheld. In response to other comments, we have revised the rule to require the Division to supply a log of certain privileged documents and lists of other withheld documents.

### III. Commission's Findings and Order Granting Accelerated Approval of Proposed Rules

The Board has asked the Commission to approve the proposed temporary rules prior to the thirtieth day after the date of publication of notice of the filing to ensure the efficient implementation of the registration process under section 102 of the Act.

Under section 102 of the Act, Congress required accounting firms to register with the Board by October 22, 2003, the 180th day from the Commission's section 101(d) determination that the Board is organized and has the capacity to carry out the requirements of, and enforce compliance with, the Act. The Board began accepting registration forms on August 7, 2003. Under section 102(c)(i) of the Act, the Board is required to issue a notice of disapproval or seek additional information within 45 days of receiving a registration form. Furthermore, section 105(c) of the Act requires that the Board, among other things, establish fair disciplinary procedures. Under rules previously adopted by the Board and approved by the Commission, the Board may not disapprove an application without first giving the applicant an opportunity for a hearing. On July 28, 2003, the Board proposed procedural rules for disapproving a registration application, as part of its Rules on Investigations and Adjudications. The Board sought and received comments on the proposals. After considering the comments, the Board adopted temporary rules relating to registration disapproval procedures on September 29, 2003.

Pursuant to section 107(b) of the Act, the Commission shall approve proposed rules upon a finding that such rules are consistent with the Act and with the securities laws or are necessary or appropriate in the public interest or for the protection of investors. Although the Commission will later consider permanent rules, the proposed temporary rules will facilitate the process of making determinations on new and pending registration applications. On the basis of the foregoing, the Commission finds that the temporary rules are consistent with the requirements of sections 102, 105(c) and 107(b) of the Act and the securities laws<sup>6</sup> and are necessary and appropriate in the public interest and for the protection of investors.

Because accounting firms already have begun submitting registration

<sup>6</sup> The Commission has considered whether the action will promote efficiency, competition and capital formation.

forms to the Board, both the Board and accounting firms would benefit from the operation of procedures to resolve issues relating to registration before the approval of permanent rules. In connection with these temporary rules, accounting firms and other members of the public have been given an opportunity to participate in the Board's rulemaking process. A further opportunity for public comment will be provided when the Commission publishes the permanent rules on investigations and adjudications for comment. In the meantime, the temporary rules will allow the Board to administer the registration disapproval process in the event that a hearing is necessary before permanent rules are approved by the Commission.

The Commission believes that the proposed temporary rules will enable the Board to properly exercise its authority and perform its responsibilities within the time frame specified by the Act. Because of the importance of registering accounting firms to the operation of the Board and the benefit provided by the Board's inspection, investigation and enforcement functions, expedited implementation of the temporary rules is consistent with the public interest and protection of investors.

The Commission therefore finds good cause, consistent with sections 102, 105 and 107 of the Act and section 19(b)(2) of the Exchange Act, to approve the proposed temporary rules on an accelerated basis.

Interested persons are invited to submit written data, views and arguments concerning the proposed temporary hearing rules, including whether the rules are consistent with the Act and the securities laws or are necessary or appropriate in the public interest or for the protection of investors. Commenters may prefer to comment on the PCAOB's proposed permanent rules for investigations and adjudications when the Commission publishes those rules for comment. Persons making written submissions with regard to the proposed temporary hearing rules should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549-0609. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed temporary hearing rules that are filed with the Commission, and all written communications relating to the proposed temporary hearing rules between the Commission and any person, other than those that may be withheld from the public in accordance

with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Room. All submissions should refer to File No. PCAOB-2003-06 and should be submitted by December 17, 2003.

#### IV. Conclusion

*It is therefore ordered*, pursuant to sections 102, 105 and 107 of the Sarbanes-Oxley Act and Section 19(b)(2) of the Exchange Act that the proposed temporary rules (File No. PCAOB-2003-06) be and hereby are approved on an accelerated basis.

By the Commission.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 03-28597 Filed 11-14-03; 8:45 am]

BILLING CODE 8010-01-P

## SECURITIES AND EXCHANGE COMMISSION

[Release No. 35-27749]

### Filings Under the Public Utility Holding Company Act of 1935, as Amended ("Act")

November 7, 2003.

Notice is hereby given that the following filing(s) has/have been made with the Commission pursuant to provisions of the Act and rules promulgated under the Act. All interested persons are referred to the application(s) and/or declaration(s) for complete statements of the proposed transaction(s) summarized below. The application(s) and/or declaration(s) and any amendment(s) is/are available for public inspection through the Commission's Branch of Public Reference.

Interested persons wishing to comment or request a hearing on the application(s) and/or declaration(s) should submit their views in writing by December 3, 2003, to the Secretary, Securities and Exchange Commission, Washington, DC 20549-0609, and serve a copy on the relevant applicant(s) and/or declarant(s) at the address(es) specified below. Proof of service (by affidavit or, in the case of an attorney at law, by certificate) should be filed with the request. Any request for hearing should identify specifically the issues of facts or law that are disputed. A person who so requests will be notified of any hearing, if ordered, and will receive a copy of any notice or order issued in the matter. After December 3, 2003, the application(s) and/or declaration(s), as filed or as amended, may be granted and/or permitted to become effective.

### Dominion Resources, Inc., et al. (70-10155)

Dominion Resources, Inc. ("DRI"), a registered public-utility holding company, and Dominion Energy, Inc. ("DEI"), its direct, wholly owned nonutility subsidiary (together, "Applicants"), both located at 120 Tredegar Street, Richmond, Virginia 23219, have filed an application-declaration under sections 6(a), 7, 9(a), 10, 12 (b) and (d) and 13 of the Act and rules 53 and 54.

DRI and DEI propose to organize and acquire Dominion Wholesale, Inc. ("DWI"), as a subsidiary of DEI to assist their nonutility electric generation and gas-related subsidiaries in the procurement, storage and maintenance of materials, machinery, equipment, services and supplies (the "Equipment") more cost effectively and, incidentally, to sell Equipment to unaffiliated third parties.

DRI and DEI have multiple subsidiaries, utility and nonutility, engaged in the generation of electricity.<sup>1</sup> DRI and DEI state that DWI will provide (a) procurement, storage, maintenance and sales of Equipment to affiliated nonutility companies and (b) incidental

<sup>1</sup> DRI's principal utility subsidiaries are: (1) Virginia Electric and Power Company ("Virginia Power"), a regulated public utility engaged in the generation, transmission and distribution of electric energy in Virginia and northeastern North Carolina; (2) The Peoples Natural Gas Company ("Peoples"), a regulated public utility engaged in the distribution of natural gas in Pennsylvania; (3) The East Ohio Gas Company ("East Ohio"), a regulated public utility engaged in the distribution of natural gas in Ohio, and (4) Hope Gas, Inc. ("Hope"), a regulated public utility engaged in the distribution of natural gas in West Virginia. Virginia Power is a direct subsidiary of DRI. Consolidated Natural Gas Company ("CNG") is a direct subsidiary of DRI and also a registered holding company, directly owning Peoples, East Ohio and Hope. DRI's nonutility activities are conducted through: (1) DEI, active, through its direct and indirect subsidiaries (together with DEI, the "DEI Companies"), in competitive electric power generation and in development, exploration and operation of natural gas and oil reserves; (2) direct and indirect subsidiaries of Virginia Power, engaged in acquiring raw materials for nuclear power stations owned and operated by Virginia Power, fuel procurement for Virginia Power, energy marketing and nuclear consulting services; (3) direct and indirect subsidiaries of CNG, engaged natural gas business (other than retail distribution), including transmission, storage and exploration and production; and (4) DRI's interest in Dominion Fiber Ventures LLC which owns Dominion Telecom, Inc., owner of a fiber optic network providing telecommunications and advanced data services. DRI recently announced its intention to sell its telecommunications assets. DRI has another nonutility subsidiary, Dominion Capital, Inc., a diversified financial services company with operating subsidiaries in commercial and residential lending and merchant banking businesses, which is being sold pursuant to Commission order. See Dominion Resources, Inc., Holding Co. Act Release Nos. 27113 and 27644 (December 15, 1999 and January 28, 2003, respectively).